Office Supreme Court, U.S.
FILED
MAR 5 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 895

WILLIAM FISHER,

Petitioner,

vs.

THE CITY OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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March 4, 1963

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No.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner respectfully shows:

I. OPINIONS BELOW.

The opinion of the District Court for the Southern District of New York dismissing petitioner's complaint for want of jurisdiction is reported in 208 F. S. 681. The *per curiam* affirmance of the Second Circuit Court of Appeals is reported in 311 F(2). —They are printed at p. 16a of the record and p. 24 of the appendix hereto respectively.

II. GROUNDS ON WHICH JURISDICTION IS INVOKED.

(1) The judgment of the Court of Appeals sought to be reviewed was dated and entered on January 24, 1963.

(2) Rehearing was not sought. On February 19, 1963 the Court of Appeals granted a 30-day stay of its mandate to facilitate the filing of this petition.

(3) The statutory provision believed to confer jurisdiction on this Court to review the judgment in question by writ of certiorari is 28 U. S. C. Sec. 1254(1).

III. QUESTIONS PRESENTED FOR REVIEW.

(1) Whether the Second Circuit Court of Appeals has has determined, contrary to prior decisions of this Court and of the Seventh, Eighth and Ninth Circuit Courts of Appeal, that petitioner does not have a cognizable damage claim against the respondent municipality under the 14th Amendment, Section 1 and 28 U. S. C. Sections 1343(3) and 1331(a);

(2) Whether a municipality can administratively impose its own time limitation against the assertion of a federal Constitutional claim in a federal court, particularly where such limitation expired while petitioner was diligently pursuing his remedy against the state in justified reliance upon a prior decision of this Court that the District Attorney responsible for petitioner's void conviction and eleven year incarceration was an agent of the state and not of the municipality until the highest state court had, for the first time, decided otherwise.

IV. CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED.

These are: The 14th Amendment to the Constitution of the United States, Section 1; 28 U. S. C. Sections 1331(a) and 1343(3); 42 U. S. C. Section 1983; New York Civil Practice Act (Clevenger ed.), Section 50(1); New York General Municipal Law (McKinney ed.), Section 50-e; Administrative Code of the City of New York, Section 349a1.0, set forth in the appendix to this petition.

V. STATEMENT OF THE CASE.

In 1933 petitioner was convicted in the New York City Court of General Sessions of the state crime of first-degree manslaughter and sentenced to 15 to 30 years in a state penitentiary. In October, 1944, after eleven years of incarceration, he was released by the state parole board and placed on parole until October, 1963. Following his release petitioner moved in General Sessions for a vacatur of his conviction[1]. His motion was denied and the denial affirmed by the Appellate Division of the New York Supreme Court (*People* v. *Fisher*, 4 N. Y. A. D. (2d) 1011). However, on a further appeal, the New York Court of Appeals reversed and remanded for a hearing on the facts (*id.*, 4 N. Y. (2d) 943). Following such hearing petitioner's motion was granted at the Court of General Sessions and his conviction vacated on the grounds it was improper because of deprivation at his trial of his Constitutional right to due process

[1] Three years after petitioner's conviction the Assistant District Attorney swore that the gun identified at the trial as Fisher's was not his. It was also established that this prosecutor suppressed at the trial the testimony of two police officers which placed petitioner away from the scene of the crime; also that the bullet could not have been fired by Fisher (*People* v. *Fisher*, 23 N. Y. Misc. (2d) 391).

of law (*People* v. *Fisher*, 23 N. Y. Misc. (2d) 391). On December 24, 1958 the original indictment was dismissed on consent of the District Attorney for New York County (legally and geographically a part of New York City).

This Court had, in 1935, in *Spielman Mofor Co.* v. *Dodge*, 295 U. S. 89, 92-5[2], squarely held that a New York County District Attorney, in enforcing state criminal laws, was a state officer performing a state and not a local function. On January 8, 1959 petitioner accordingly filed in the state Court of Claims[3] his claim for compensation against the state for damages for his unlawful conviction and eleven year incarceration. The Court of Claims dismissed petitioner's complaint for defects in pleading, with leave to amend, noting "The claimant may well have a cause of action against the State. Sympathetically, we say that he should have" (*Fisher* v. *State*, 20 N. Y. Misc. (2d) 818, 819). However, it thereafter dismissed the amended complaint on the ground the District Attorney responsible was not an officer of the State but of the respondent City (*id.* 23 N. Y. Misc. (2d) 935). This decision was affirmed by the Appellate Division (*id.*, 13 N. Y. A. D. (2d) 608) and by the New York Court of Appeals, the highest state court (*id.*, 10 N. Y. (2d) 60) which expressly declined to follow *Spielman Motor Co.* v. *Dodge*, *supra*, 295 U. S. 89, 92-5.

Thereafter the New York Legislature passed an Act authorizing the state Supreme Court to take jurisdiction of petitioner's claim against the City. On April 24, 1962 this Act was vetoed by the Governor in a message stating the veto had been urged by the Mayor of the respondent City

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[2] Opinion by Chief Justice Hughes, a former Governor of New York.

[3] Pursuant to the N. Y. Court of Claims Act, Sec. 8 (N. Y. L. 1939, Ch. 810).

on the ground "There is no moral or legal obligation on the part of the City to compensate the claimant," a conclusion which the District Court below strongly disapproved.[4]

Petitioner, rightfully believing he had exhausted his state remedies, judicial, legislative and executive, then instituted this action in the District Court for the Southern District of New York on June 20, 1962, expressly alleging federal jurisdiction under 28 U. S. C. Sec. 1343, a cause of action against the City for deprivation of his liberty and civil rights, including personal suffering, degradation and impairment of reputation, mental anguish and loss of income, without due process of law in violation of the 14th Amendment, Section 1 to the Constitution of the United States and damages in excess of the jurisdictional minimum prescribed by 28 U. S. C. Sec. 1331(a). On July 9, 1962 the respondent City appeared generally and moved pursuant to F. R. C. P. 12(b) (6) for dismissal of the complaint "for failure to state a claim upon which relief can be granted", although actually moving on its attorney's affidavit claiming that petitioner's cause of action was then affirmatively barred by two alleged local statutes of limitation of one and two years respectively.[5]

On September 20, 1962 the District Court (Bonsal, D. J.) in an opinion (208 F. S. 684) dismissed the complaint for "lack of jurisdiction" on the ground that it was an action under the Civil Rights Act of 1871 (42 U. S. C. Sec. 1983, R. S. Sec. 1979) which could not be maintained against a municipality under the rule of *Monroe* v. *Pape*, 365 U. S.

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[4] *Fisher* v. *City of New York*, 208 FS 681, 682. On a constitutional claim to denial of due process this Court will look at the whole sequence of state action (Frankfurter, J., in *Monroe* v. *Pape*, 365 U. S. 167, 259, citing *Malinski* v. *New York*, 324 U. S. 401, and other cases.)

[5] *N. Y. City Administrative Code, Sec. 349a 1.0* providing for a general limitation of one year on all suits against the City; *N. Y. Civil Practice Act, Sec. 50[1]* imposing a two year limitation on suits for false imprisonment under state law (N. Y. L. 1920, ch. 925).

167, 487-92. On Janaury 24, 1963 the Court of Appeals for the Second Circuit affirmed *per curiam*: (1) on the ground stated below and (2) for alleged failure to state a cause of action under the 14th Amendment, Sec. 1, citing *Bell* v. *Hood*, 327 U. S. 678, where, *on the contrary*, a complaint based "squarely" on the 5th and 4th Amendments and asking damages against federal officials *was sustained* by this Court. Rehearing was not applied for.[6]

During all of the time petitioner was diligently pursuing his rights in the state courts in the justified belief that he had been unlawfully indicted, convicted and incarcerated by agencies of the state (this court had held the District Attorney was a "state" official, the indictment and prosecution were in the name of the "People of the State of New York", petitioner's eleven year incarceration occurred in a "state" penitentiary and he was then placed on nineteen years parole by a "state" parole board), the state opposed his claim to compensation on the ground that it was a liability only of the City, until after the claimed local statutes of limitation in favor of the City had expired. Then, when petitioner secured a jurisdictional Act enabling him to proceed against the City in the state courts, the City itself procured a veto on the ground it had "no moral or legal obligation" toward petitioner. Then, having exhausted all state remedies, judicial, legislative and executive, when petitioner turned to the federal courts for the enforcement of his plain federal Constitutional rights under the 14th Amendment the respondent City sought dismissal of his complaint, *not* on the alleged ground of "lack of jurisdiction", raised *sua sponte* by the courts below directly

[6] It would have been futile in view of the *per curiam* opinion that petitioner's claim was "patently without merit." See the concurring opinion of Mr. Justice Frankfurter in *Western Pacific RR Corp.* v *Western Pacific RR Co.*, 345 U. S. 247 at 270; *Stamphill* v. *Johnston*, 136 F (2) 291, 292 (CA 9, 1943).

in the face of the allegations of the complaint itself, but on the alleged claim that plaintiff is *now* barred by two alleged local statutes of limitation of one and two years respectively (*City of New York Administrative Code*, Sec. 394a-1.0; *N. Y. Civil Practice Act*, Sec. 50(1)). Seldom if ever has a stronger case been established for an estoppel to plead a local "statute" of limitations, assuming *arguendo* of course that such local restrictions can be applicable matters in affirmative defense (under F. R. C. P. 8(c)) to a suit grounded on the 14th Amendment and its concomitant jurisdictional acts (28 U. S. C. Secs. 1343, 1331) wherein no such limitations are contained or made applicable.

VI. REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

(a) The lower courts were plainly wrong in holding that this is a Civil Rights Act case which can not be maintained under *Monroe* v. *Pape*, 365 U. S. 167.

Although the complaint plainly averred this suit was brought solely and squarely on the 14th Amendment, Section 1 and its implementing jurisdictional statute (28 U. S. C. Sec. 1343(3)) and although the requisite jurisdictional amount was both expressly averred (28 U. S. C. Sec. 1331(a)) and is plainly inherent in the cause of action itself, involving deprivation of liberty and civil rights for eleven years without due process, with consequent "degradation and impairment of reputation, mental anguish, loss of income and the cost of litigation"[7] to invalidate the void judgment of conviction, the District Court, by some inexplicable metabasis, transformed the cause of action pleaded

[7] See *Hoffner* v. *New York*, 207 N. Y. Misc. 1070, where a similar false imprisonment for approximately the same period was compensated in the sum of $112,290.

into one brought under the Civil Rights Act of 1871 (42 U. S. C. Sec. 1983, R. S. Sec. 1979) and then dismissed it under the rule of *Monroe* v. *Pape*, 365 U. S. 167, which decided only that an action under that Act can not be maintained against a municipality since the latter is not a "person" as that term was intended in the Act, as plainly appears from the Act's legislative history (365 U. S. 161, 187-192).[8]

The courts below are plainly and demonstrably wrong in this respect. It was up to the petitioner to choose his own cause of action (*Bell* v. *Hood*, 327 U. S. 678, 681; *The Fair* v. *Kohler Die Co.*, 228 U. S. 22, 25; *Wiley* v. *Sinkler*, 179 U. S. 58, 64-65; *Swafford* v. *Templeton*, 185 U. S. 487, 491-492) not for the courts below to impose upon him, for dismissal purposes, one that manifestly could not be maintained under the prior decisions of this Court.

To fortify its conclusion the District Court cited a law review note: "The Proper Scope of the Civil Rights Act", 66 Harvard L. R. 1285. However, even this makes clear that for a damage suit on the federal Constitution, as here, there must be present a requisite jurisdictional amount of over $10,000 (28 U. S. C. Sec. 1331 (a)) whereas the Civil Rights Act suit (42 U. S. C. Sec. 1983) involves rights that are not readily susceptible of monetary valuation and which may be far below this jurisdictional minimum (66 Harvard L. R. 1285, 1288, citing *Hague* v. *C. I. O.*, 307 U. S. 496, 531).

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[8] "Before the Court . . . petitioners have limited their claim to recovery to the liability imposed by (R. S.) Sec. 1979. Accordingly only that Section is before us." (*Monroe* v. *Pape*, 365 U. S. 167 at 170).

(b) Since 1875 there have been parallel but separate and independent jurisdictional acts conferring original federal court jurisdiction.

The Civil Rights Act (17 Stat. 13) was enacted April 20, 1871 to meet the Ku Klux Klan menace in the Reconstruction era when state laws protecting the rights of citizens were not enforced (*Monroe* v. *Pape*, *supra*, 365 U. S. 167, 171, 187) and it was aimed at "persons", not municipalities (*Id.*). Not until March 3, 1875, four years later, were federal courts given original jurisdiction of civil suits arising directly under the federal Constitution, provided the amount involved in damage suits exceeded a stated minimum (18 Stat. 470, now 28 U. S. C. Sec. 1331). This is made plain in the opinions of Justices Roberts and Stone in *Hague* v. *C. I. O.*, *supra*, 307 U. S. 496, 507, 527-33, setting forth the history of this legislation.

These opinions establish that since 1875 there have been two jurisdictional acts, one conferring original jurisdiction on district or circuit courts to entertain suits for damages arising under the Constitution or laws of the United States wherein the amount in controversy exceeds a specified value; the other conferring jurisdiction on equity suits authorized by the Civil Rights Act to protect rights or immunities, regardless of the amount in controversy and which may have little, if any, ascertainable pecuniary value. This is also made plain in the dissenting opinion of Mr. Justice Frankfurter in *Monroe* v. *Pape*, 365 U. S. 167 at 252, pointing out that until the Act of 1875 there was no original "federal question" jurisdiction in the federal courts. Thus it is plain that petitioner's suit on the 14th Amendment could not be grounded on the Civil Rights Act of 1871, nor was it grounded on that Act.

"It was up to the plaintiff to decide how he sues" (*Bell v. Hood, supra*, 327 U. S. 678, 681). Petitioner here made it as plain as it is possible to do that his complaint was based upon the Fourteenth Amendment and the jurisdictional acts (28 U. S. C. Sec. 1331, 1343) *not* on the Civil Rights Act of 1871 (42 U. S. C. Sec. 1983). The test is the sum claimed in good faith (*Hague v. C. I. O., supra*, 307 U. S. 496, 507; *Wiley v. Sinkler*, 179 U. S. 58; *Swafford v. Templeton*, 185 U. S. 487). This clearly appears in the complaint, hence the conclusion of the District Court, affirmed by the Court of Appeals, that plaintiff's action is a claim "under 42 U. S. C. Sec. 1983" (the Civil Rights Act) is demonstrably wrong. Petitioner's suit is "directly on the Constitution" and the alleged violations of the Fourteenth Amendment are not immaterial but form rather the sole basis for the suit (*Bell v. Hood, supra*, 327 U. S. 678, 681, 683). The reach of the Fourteenth Amendment is coextensive with any exercise by a state of power, in whatever form exerted, and it is immaterial that the state authorized the wrong or that the actions in question are those of its municipality (*Home Tel. & Tel. Co. v. Los Angeles*, 227 U. S. 278, 286). Every local official is bound by the 14th Amendment (*United States v. Raines*, 362 U. S. 17, 25; *Cooper v. Aaron*, 358 U. S. 1, 16-19). Thus dismissal of the complaint upon the ground of "lack of jurisdiction" in a suit under the 14th Amendment would only be justified if petitioner's claim were "so attenuated and unsubstantial as to be absolutely devoid of merit or frivolous" (*Baker v. Carr*, 369 U. S. 186, 199; *Bell v. Hood, supra*, 327 U. S. 678, 683). "That the claim is unsubstantial must be 'very plain'" (*Baker v. Carr, supra; Hart v. Keith Vaudeville Exchange*, 262 U. S. 271, 274). Plainly a claim for eleven

years loss of liberty and civil rights under a void judgment of conviction, since vacated, is a substantial federal Constitutional claim. As the District Court held:

> "On the facts stated, it seems most unfortunate that this plaintiff, having once been denied due process and serving eleven years in the penitentiary as a result, can not be provided a forum in which to assert his claim for compensation for his detention" (208 F. S. 681, 682).

(c) The Second Circuit Court of Appeals decided petitioner's Constitutional claim in a way contrary to applicable decisions of this Court and of the Courts of Appeal for the Seventh, Eighth and Ninth Circuits.

The Second Circuit Court of Appeals, in its two paragraph *per curiam* affirmance, rendered only six days after submission, affirmed "for lack of jurisdiction" the decision below "Insofar as plaintiff's claim . . . is based upon 28 U. S. C. Section 1343(3) and 42 U. S. C. Section 1983", citing *Monroe* v. *Pape*, *supra*, 365 U. S. 167; *Eagan* v. *City of Aurora*, 365 U. S. 514 and its own recent decision in *Spampinato* v. *City of New York*, 311 F(2) [illegible]. But petitioner's claim is not "based upon" 42 U. S. C. Sec. 1983 at all, thus the cited decisions, involving solely Civil Rights Act cases and determining merely that municipalities are not "persons" within the intendment of that Act, as disclosed by its legislative history, are without relevancy here.

Correctly treating petitioner's claim as one directly based on the 14th Amendment, Section 1, the Court of Appeals then dismissed it (apparently on the merits) on the supposed authority of *Bell* v. *Hood*, 327 U. S. 678 and *Shaffer* v. *Jordan*, 213 F(2) 393, 396-7 (C. A. 9, 1954). But *Bell* v. *Hood* was a damage suit against federal agents

under the 5th and 4th Amendments for an illegal search, seizure and arrest wherein decisions of the two lower courts dismissing the complaint were reversed and it was reinstated by this Court in a powerful opinion since followed in the other Circuits. And in *Shaffer* v. *Jordan*, although federal jurisdiction was there upheld, a complaint for declaratory relief relating to an election was dismissed as not stating a cause of action against the California Secretary of State, it appearing that his actions complained of were in fact lawful under California state law and that plaintiffs were not deprived of any rights thereby. That, of course, is the exact converse of the situation here. The New York courts voided petitioner's unlawful conviction on the ground that he had been denied due process. Then, having recognized the initial wrong done petitioner, New York proceeded further to deny him due process by refusing him a forum wherein he could assert his claim to redress under applicable state law. The respondent City, by its Mayor, admittedly administered the final *coup* in this connection by securing its veto, after a jurisdictional Act for petitioner's relief had passed both houses of the state legislature, on the ground it owed "no moral or legal" duty to petitioner. The reach of the 14th Amendment "is coextensive with any exercise by a State of power, in whatever form exercised" (*Home Tel. & Tel. Co.* v. *Los Angeles*, *supra*, 227 U. S. 278, 287) and every state official, high and low, is bound by it (*United States* v. *Raines*, *supra*, 362 U. S. 17, 25). Even a state court judgment which denies due process constitutes "state action" within the purview of the 14th Amendment and may in itself deprive a litigant of due process of law (*Johnson* v. *Eisentrager*, 339 U. S. 763, 797; *Am. Federation of Labor* v. *Swing*, 312 U. S. 321, 324, 715; *Shelley* v. *Kraemer*, 334 U. S. 1, 14-18).

The rule of *Bell v. Hood* has, of course, been followed in numerous Circuit Court decisions. In *Louie* v. *Manhattan Beach City School District*, 222 F. (2) 258, 259 (C. A. 9, 1955), a suit for damages for the conversion of real and personal property was sustained under the 14th Amendment and 28 U. S. C. Sec. 1331; in *Barnes* v. *Kansas City Office of the F. B. I.*, 185 F. (2) 409, 411 (C. A. 8, 1950), a suit for a declaratory judgment was dismissed because plaintiff had an adequate remedy for damages against federal agents under the 5th Amendment and the rule of *Bell* v. *Hood*; in *Agnew* v. *City of Compton*, 239 F. (2) 226, 229 (C. A. 9, 1957), it was held that a suit under the Constitution for more than the jurisdictional minimum could be maintained under 28 U. S. C. Sec. 1331; in *Adams* v. *City of Park Ridge*, 293 F (2) 585, 587 (C. A. 7, 1961), equitable causes of action were held cognizable under the 14th Amendment and 28 U. S. C. Sec. 1343(3); in *Harmon* v. *Superior Court*, 307 F. (2) 796, 798 (C. A. 9, 1962), it was held error to dismiss a complaint alleging deprivation of rights under the federal Constitution, regardless of how unsubstantial they may be claimed to be, and that the right to a hearing on the matter in a federal court "is of the essence of our judicial system" (p. 798); in *Wheeldin* v. *Wheeler*, 280 F. (2) 293, 294 (C. A. 9, 1960), jurisdiction was upheld to entertain a federal Constitutional claim for damages against a Congressional investigating agent; in *Hicks* v. *City of Los Angeles*, 240 F. (2) 495, 497 (C. A. 9, 1957) jurisdiction of a damage suit under the 14th Amendment based on a wrongful discharge from employment with a resulting denial of due process was upheld.

All these cases follow the rule of *Bell v. Hood*, *supra*. There can not be one rule in the Second Circuit and another elsewhere as regards a citizen's rights under the 14th

Amendment. See also *United States* v. *Williams*, 341 U. S. 58, 66, restating that a District Court could determine on the merits a damage suit brought under the federal Constitution; *Dann* v. *Studebaker-Packard Corp.*, 288 F(2) 201, 211 (C. A. 6, 1961); *Mainelli* v. *Providence Journal Co.*, 201 F. S. 7, 9 (D. C. R. I. 1961).

(d) A municipality can not bar assertion of a federal Constitutional claim against it by interposing its own administrative time limitation for commencing suit.

While the District Court, in dismissing the complaint under F. R. C. P. 12(b)(6) as not stating a cause of action of which it had jurisdiction under the Civil Rights Act, did not reach the question of the "statute" of limitations, if any, applicable to a suit under the federal Constitution, the Court of Appeals based its *per curiam* affirmance in part on its own then unreported decision in *Spampinato* v. *City of New York*, *supra*, 311 F(2) , where a Civil Rights Act suit was held barred by an unspecified[9] "New York Statute of Limitations". And since the same question was raised below by the respondent City it should be settled here.

Although F. R. C. P. 8(c) specifically requires such defense be affirmatively pleaded by way of answer some Circuit Courts now hold that F. R. C. P. 9(f), making averments of time material in testing the sufficiency of a complaint, permits the dismissal of a complaint under F. R. C. P. 12(b)(6) that on its face is barred by limitations (*1-A Barron & Holtzoff: Federal Practice & Procedure*, p. 187 and collected cases). This question has never been decided by this Court. It should be now,

[9] There are 52 sections in the New York Civil Practice Act dealing with limitation of actions brought under state law (N. Y. L. 1920, ch. 925, Article 2 "Limitations of time".)

At the outset it may be restated that federal jurisdiction here is not grounded on diversity of citizenship, hence the rule of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, is inapplicable. Moreover, this is not a suit for false imprisonment under state law, hence the New York two year statute of limitations in such suits (Civil Practice Act, Sec. 50(1)), is inapplicable to a suit under the 14th Amendment.

The respondent City, however, urged below its own self erected administrative code limitation of one year[10] for the commencement of actions against it from the date of their accrual, here admittedly on December 28, 1958 when the City finally consented to dismissal of the void indictment against petitioner. But petitioner was not told by the highest New York court until June 6, 1961, in a matter of first impression there, that it declined to follow the 1935 decision of this Court, and ruled for the first time that the District Attorney (then deceased) responsible for petitioner's eleven year incarceration was an agent of the City, not of the State, as petitioner rightfully believed the law to be theretofore (*Fisher* v. *State*, 10 N. Y. (2d) 60). The period of limitations now urged by respondent as a bar to this action had then, of course, long since expired, as had the state statute of limitations, assuming *arguendo* that it was applicable on any theory.[11] The District Court noted this plainly inequitable consequence (208 F. S. 681, 682).

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[10] N. Y. City Administrative Code, Sec. 394 a 1.0.

[11] Doctrines of sovereign immunity can have no application to suits for invasion of Constitutional rights (*Sterling* v. *Constantin*, 287 U. S. 378, 393). Thus a local ordinance (or administrative regulation) can not deny rights created by the federal constitution (*Cooper* v. *Aaron*, *supra*, 358 U. S. 1, 16).

Thereafter it is unquestioned that petitioner labored diligently to procure jurisdictional legislation enabling him to proceed in the state courts against the City, down to April 24, 1962 when, after passing the state legislature, it was vetoed at the very instance of the respondent City itself who saw no "moral or legal obligation" to petitioner for his eleven years imprisonment under proceedings that were admittedly *coram non judice*.

The respondent City conducted its unfounded prosecution of petitioner in the name of the "People of the State of New York" under "state" law and, acting through its own Court of General Sessions, incarcerated him for a period of eleven years in a "state" penitentiary from which he was then released and placed on nineteen years probation by a "state" board of parole. In this period this Court, in *Spielman Motor Co.* v. *Dodge*, *supra*, 295 U. S. 89, squarely held that the District Attorney responsible for this deprivation of due process and unconstitutional restraint was, for these very purposes, an agent of the State, not the City, and the City obviously did nothing to disabuse that view of the law. Then, when petitioner sued the State, this rule of law was flatly rejected by its highest court and, for the first time, the District Attorney responsible was then held to be solely an agent of the City. This respondent then asserted its own self-imposed administrative barrier of a one year time limitation against this suit on the 14th Amendment which, of course, had then long since expired. All then knew, also, that the District Attorney and his Assistant who was responsible for the void indictment and conviction were then long since deceased (cf. *Bell* v. *Hood*, *supra*, 327 U. S. 678).

This Court will not hesitate to strike down a municipal enactment that abridges the constitutional guarantees of the

14th Amendment (*Hague* v. *C. I. O.*, *supra*, 307 U. S. 496; *Home Tel. & Tel. Co.* v. *Los Angeles*, *supra*, 237 U. S. 278). To hold that this suit on the 14th Amendment could be abridged or barred by an administrative limitation imposed by the respondent itself is plainly untenable (cf. *Home Tel. & Tel. Co.* v. *Los Angeles*, *supra*).

Thus the respondent City plainly is estopped to raise its own administrative time limitation of one year to this suit against it upon a federal Constitutional claim of denial of due process (*Glus* v. *Brooklyn Eastern District Terminal*, 359 U. S. 231) and it is immaterial whether petitioner's delay was due to a "mistake" of law or not. Petitioner followed the law established by this Court in *Spielman Motor Co.* v. *Dodge*, *supra*, 295 U. S. 89, upon a string of New York precedents, until the highest New York court repudiated that decision on June 6, 1961 (*Fisher* v. *State*, *supra*, 10 N. Y. (2) 60) and held that the City and not the State was responsible for his misfortune. By then it was too late under the City's own administrative time limitation, or even under the state statute of limitations, for petitioner to pursue the City for relief under state law. His diligence since then in seeking relief from the state legislature is both demonstrated and unquestioned. Yet petitioner was finally thwarted in securing that relief at the very instance of the respondent City itself, acting through its Mayor.

It is a principle "older than the country itself" that "no man may take advantage of his own wrong" (*Glus* v. *Brooklyn Eastern District Terminal*, *supra*, 359 U. S. 231, 232; *Schroeder* v. *Young*, 161 U. S. 334; *Insurance Co.* v. *Wilkinson*, 13 Wall. 222, 233). Thus despite the delay in bringing suit petitioner is entitled to have his case tried

on the merits, it appearing that respondent so conducted itself that petitioner, acting in good faith, was delayed in the bringing of this action (*id.*).

(e) State court limitations can not control assertion of a federal Constitutional right in a federal court sitting in the state.

The absence of specific directions from Congress in authorizing suits under the Constitution does not necessarily lead to the result that state statutes of limitation should apply to Fourteenth Amendment suits (*McAllister* v. *Magnolia Petroleum Co.* 357 U. S. 221, 227-9). This is one nation wherein the Constitutional guarantees apply equally in all the states. Obviously federal courts can not subject parties claiming Constitutional rights to variant state statutes of limitation. Thus to enforce a single state statute (or a local municipal regulation) in a suit of this character would disrupt all this (*id.*). Where resort is had to a federal court, not on diversity grounds but because a federal right is claimed, state court limitations do not control a federal court sitting in the state (*Angel* v. *Bullington*, 330 U. S. 183, 192; *Holmberg* v. *Ambrecht*, 327 U. S. 392)[12].

VII. CONCLUSION.

As was said in the similar case of *Hoffner* v. *New York*, *supra*, 207 N. Y. Misc. 1070, 1072:

> "The claimant has been humiliated, degraded, shamed and suffered a loss of reputation and earn-

[12] Where this Court reversed the Second Circuit Court of Appeals for erroneously applying the 10-year New York Statute of Limitations (Civil Practice Act Sec. 53(2)) in a suit under a federal statute and plaintiff's delay was, as here, a justifiable one.

ings. For this he must be paid and for this money damages can be compensatory. But all the wealth of the State of New York could not compensate the claimant for the mental anguish suffered through nearly twelve years of false imprisonment, under the impression he would be there for the rest of his life. How can a man be repaid who has been branded a murderer and whose only hope is an early death to release him from the sentence erroneously imposed on him? For this, any award is bound to be a mere token, but it should compensate as well as the medium allows."

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court directed to the Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and proceedings of the said Circuit Court had in case numbered and entitled on its docket No. 213, October Term, 1962, William Fisher, Appellant *v.* The City of New York, respondent, to the end that this case may be reviewed and determined by this Court as provided for by the Constitution and statutes of the United States; and that the judgment herein of said Court of Appeals be reversed by the Court, and for such further relief as to this Court may seem proper

Respectfully submitted,

ALBERT G. AVERY
Attorney for Petitioner
No. 70 Pine Street
New York 5, New York

Dated: March 4, 1963

APPENDIX.

Constitutional Provisions, Statutes and Regulations Involved.

14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

"SECTION 1: . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

28 U. S. C. SECTION 1254 (62 STAT. 928). COURTS OF APPEALS; CERTIORARI: * * *

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; * * *."

28 U. S. C. SECTION 1331 (72 STAT. 415). FEDERAL QUESTION; AMOUNT IN CONTROVERSY

"(a) The district courts shall have original jurisdiction of all civil sections wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States."

28 U. S. C. SECTION 1343. (62 STAT. 932). CIVIL RIGHTS AND ELECTIVE FRANCHISE

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . .

(3) To redress the deprivation under color of any State law, statute, ordinance, regulation, custom or usage, of

any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; . . .".

42 U. S. C. Section 1983 (17 Stat. 13). Civil Action for deprivation of rights

"Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States, or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R. S. 1979."

New York Civil Practice Act (N. Y. L. 1920, ch. 925). Art. 2—Limitations of time

"Section 50. *Actions to be commenced within two years.* The following actions must be commenced within two years after the cause of action has accrued:

1. An action to recover damages for assault, battery, false imprisonment, malicious prosecution or malpractice."

New York General Municipal Law Section 50-e Notice of Claim (N. Y. L. 1945, ch. 694 §1; L. 1950 ch. 481)

"1. In any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation, as defined in the general corporation law, or any officer, appointee or employee thereof, the notice shall comply with the provisions of this section and it shall be given within ninety days after the claim arises."

Administrative Code of the City of New York

§394a-1.0. *Actions against the city.* a. In every action or special proceeding, for any cause whatever, prosecuted

or maintained against the city, the complaint or necessary moving papers shall contain an allegation that at least thirty days have elapsed since the demand, claim or claims, upon which such action or special proceeding is founded, were presented to the comptroller for adjustment, and that he has neglected or refused to make an adjustment or payment thereof for thirty days after such presentment.

b. An action against the city for damages for injuries to real or personal property, or for the destruction thereof, alleged to have been sustained by reason of the negligence of, or by the creation or maintenance of a nuisance by the city, or any agency thereof, shall be commenced within one year after the cause of action therefor shall have accrued, provided that a notice of the intention to commence such action and of the time when and place where the damages were incurred or sustained, together with a verified statement showing in detail the property alleged to have been damaged or destroyed, and the value thereof, shall have been filed with the comptroller within six months after such cause of action shall have accrued.

c. An action against the city * * * for damages for personal injuries resulting from the negligence of the city * * * or any agency of the city * * *, shall be commenced within one year after the cause of action therefor shall have accrued, provided that a notice of intention to commence such action and of the time when and place where the injuries were received shall have been served in like manner as the service of a summons in the Supreme Court, within six months after such cause of action shall have accrued upon the following: * * *

2. In all cases, upon the corporation counsel and the comptroller."

Opinion and Judgment of the District Court.

This is printed at pp. 16a-20a inclusive of the appendix record filed herewith, reported in 208 F. S. 681.

Opinion of the Court of Appeals.

No. 213—October Term, 1962

(Submitted January 18, 1963 Decided January 24, 1963)

Docket No. 27848

Before:

MEDINA, WATERMAN and MOORE, Circuit Judges.

Plaintiff appeals from a judgment of the United States District Court for the Southern District of New York, Dudley B. Bonsal, Judge, dismissing his complaint in an action against a municipality under 28 U. S. C., Section 1343(3). Opinion below reported at 208 F. Supp. 681. Affirmed.

WILLIAM B. MOORE, New York, N. Y., for Plaintiff-Appellant.

LEO A. LARKIN, Corporation Counsel, New York, N. Y., and SEYMOUR B. QUEL, New York, N. Y., for Defendants-Appellee.

PER CURIAM:

Insofar as plaintiff's claim seeking monetary compensation from the municipality for his eleven year imprisonment after a conviction for manslaughter in violation of due process of law, is based upon 28 U. S. C., Section 1343(3) and 42 U. S. C., Section 1983, we affirm on the ground of lack of jurisdiction. The attempt to distinguish

Monroe v. *Pape*, 1961, 365 U. S. 167, *Egan* v. *City of Aurora*, 1961, 365 U. S. 514, and *Spampinato* v. *City of New York*, 2 Cir., 1962, — F. 2d —, decided December 4, 1962, is "patently without merit." *Bell* v. *Hood*, 1946, 327 U. S. 678, 683.

Insofar as plaintiff's claim is based, not on the Civil Rights Act, but directly upon Section 1 of the Fourteenth Amendment to the United States Constitution, we affirm on the ground that plaintiff has not stated a claim upon which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure. See *Bell* v. *Hood*, *supra*; *Shaffer* v. *Jordan*, 9 Cir., 1954, 213 F. 2d 393, 396-97.

Affirmed.

Judgment of the Court of Appeals.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fourth day of January, one thousand nine hundred and sixty-three.
Present:

Hon. HAROLD R. MEDINA,
Hon. STERRY R. WATERMAN,
Hon. LEONARD P. MOORE,
Circuit Judges.

WILLIAM FISHER,
Plaintiff-Appellant,

v.

THE CITY OF NEW YORK,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

Order Staying Mandate.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the nineteenth day of February, one thousand nine hundred and sixty-three.

Present:

HON. HAROLD R. MEDINA,
HON. STERRY R. WATERMAN,
Circuit Judges.

WILLIAM FISHER,
Plaintiff-Appellant,

v.

THE CITY OF NEW YORK,
Defendant-Appellee.

A motion having been made herein by counsel for the appellant to stay the issuance of the mandate pending application for a writ of certiorari to the Supreme Court of the United States,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is granted in accordance with the provision of Rule 28(c) of the rules of this court.

A. DANIEL FUSARO,
Clerk.

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IN THE

Supreme Court of the United States

October Term, 1962

No. 895

WILLIAM FISHER,

Petitioner,

vs.

THE CITY OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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THE CITY OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Statement

The petitioner seeks to have this Court review by writ of certiorari a judgment of the United States Court of Appeals for the Second Circuit, entered January 24, 1963 (Pet. Appendix, p. 26), which affirmed a judgment entered on September 20, 1962, in the United States District Court, Southern District of New York, pursuant to a decision of Judge Bonsal, granting the defendant's motion to dismiss the complaint and dismissing the complaint for lack of jurisdiction.

The opinion of the Court of Appeals has not yet been reported. It will be found in Petitioner's Appendix, pp. 24-25. The opinion of the District Court is reported in 208 F. Supp. 681.

The complaint purported to allege a cause of action against the City of New York under 28 U.S.C., 1343, for an illegal deprivation of plaintiff's rights in violation of the Fourteenth Amendment to the Constitution of the United States. The District Court held that such an action could not be maintained against a municipal corporation and dismissed the complaint, citing *Monroe v. Pape*, 365 U. S. 167 (1961), and *Egan v. City of Aurora*, 365 U. S. 514 (1961).

The Court of Appeals unanimously affirmed with a brief opinion citing the same cases as the District Court and *Spampinato v. City of New York*, 311 F. 2d 439 (2d Cir., 1962) [petition for certiorari *sub judice* in this Court (Misc. #857)]. We discuss the opinion of the Court of Appeals in greater detail hereafter, *infra*, pp. 9-10.

The Complaint

The complaint is set forth at pages 8a to 11a of the appendix in Court of Appeals filed herein.

The complaint alleges that plaintiff is a citizen (par. First); and that the present action is based upon 28 U. S. C., 1343, by virtue of plaintiff's deprivation of liberty without due process of law in violation of Section 1 of the 14th Amendment (par. Second).

The complaint then alleges that in 1933 plaintiff was convicted of the crime of manslaughter, first degree, in the Court of General Sessions, New York County, and was sentenced to a term of not less than 15 nor more than 30 years in a State prison and was thereafter imprisoned until October 1944, when he was released on parole. Thereafter plaintiff moved in the Court of General Sessions to vacate his conviction; the motion was denied, but the denial was reversed by the New York Court of Appeals, and the matter remanded for a hearing. After a hearing, the judgment of conviction was reversed upon the ground that plaintiff had been improperly convicted because of deprivation at his trial of his constitutional right of due process of law. Subsequently, the plaintiff was arraigned and on December 24, 1958, the indictment against him was dismissed (pars. Third-Fifth).

The plaintiff then filed a claim against the State of New York in the New York Court of Claims. That claim was dismissed and the dismissal affirmed by the New York Court of Appeals for the reason as plaintiff alleges "that plaintiff's alleged claim should be made against the City, not the State of New York" (par. Sixth). [As to actual decision, see *Fisher v. State of New York*, 23 Misc 2d 935, aff'd 13 A D 2d 608, aff'd 10 N Y 2d 69, 176 N. E. 2d 72. The Court of Appeals and the Appellate Division did not indicate that the plaintiff had a cause of action against the City of New York. The Court of Claims went no further than to suggest that "claimant should consider the liability of the City of New York for the acts of officers of the five counties (including New York County) comprising said city" (23 Misc 2d, at p. 936)].

Section 50-e of the New York General Municipal Law provides that a claim of the aforesaid nature against the City of New York shall be filed within 90 days from the date of accrual of such claim. Such 90 day period expired on March 24, 1959, prior to the dismissal of plaintiff's claim against the State in the Court of Claims (pars. Seventh, Eighth).

Thereafter an Act was passed by the State Legislature authorizing the Supreme Court of New York State to hear and determine plaintiff's claim against the City of New York. However, such Act was vetoed by the Governor on April 24, 1962 (pars. Ninth, Tenth).

The plaintiff alleges that he has instituted this action in the only court now available for that purpose and seeks damages resulting from his invalid conviction (par. Twelfth).

ARGUMENT

The City of New York is not subject to liability under the Civil Rights Act. The complaint was properly dismissed.

(1)

The complaint herein expressly alleges (par. Second) that the action is brought pursuant to 28 U. S. C., 1343. That section confers jurisdiction upon the Federal courts in respect to actions arising under the Civil Rights Act (42 U. S. C., 1983 *et seq.*). Section 1983 provides as follows:

"Every person, who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any

> citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." *

This Court has explicitly held that the provisions of the Civil Rights Act, including 1983, do not render a municipal corporation liable for an alleged violation of the statute. *Monroe v. Pape*, 365 U. S. 167 (1961); *Egan v. City of Aurora*, 365 U. S. 514 (1961).

Monroe v. Pape, *supra*, was an action instituted against the City of Chicago and various police officers of that city pursuant to 42 U. S. C., 1983, for an alleged deprivation of plaintiff's civil rights. Federal jurisdiction was asserted under that section and 28 U. S. C., 1343, as in the instant case. The complaint was dismissed by the District Court, and the Court of Appeals affirmed the dismissal. The Supreme Court held that the dismissal of the complaint against the City of Chicago was properly granted but reversed the dismissal as to the individual defendants. While there was a dissent by Justice Frankfurter as to the plaintiff's right to hold liable the individual police officers, the Court was unanimous in upholding the dismissal against the City of Chicago. The majority opinion discussed at length the legislative history of the Civil Rights Act and then stated (365 U. S. at pp. 191-192):

> "The response of the Congress to the proposal to make municipalities liable for certain actions being brought within federal purview by the Act of April 20, 1871, was so antagonistic that we cannot believe that the word 'person' was used in this par-

ticular Act to include them. Accordingly we hold that the motion to dismiss the complaint against the City of Chicago was properly granted."

Egan v. *City of Aurora*, *supra*, was an action under the Civil Rights Act, 42 U. S. C., §§1983 and 1985. In upholding the dismissal of the complaint against the City of Aurora, the Court said (365 U. S. at p. 514):

"The dismissal as to the City of Aurora was correct, for we held in *Monroe* v. *Pape*, *supra*, that a municipality was not a 'person' within the meaning of 42 U. S. C. §1983."

On March 18, 1963, this Court denied certiorari to the plaintiff in *Wise* v. *City of Chicago*, 308 F. 2d 364 (7th Cir., 1962), in which damages were sought by the administratrix of one Arthur Wise on the ground that he had suffered deprivation of his civil rights at the hands of the City of Chicago, its Corporation Counsel, and an Assistant Corporation Counsel in a criminal prosecution. It will be noted that in that case the Court of Appeals quoted with approval (at p. 366) from *Stitt* v. *Lynch*, 267 F. 2d 237 (7th Cir., 1959), where Chief Judge Duffy, speaking for the Court, said that "prosecuting officials are not to be amerced by actions under the Federal Civil Rights Act for their actions in connection with official prosecutions even though it is alleged that such acts were done maliciously." So, even on the assumption (which we believe to be untenable) that the Assistant District Attorney in the case at bar was acting on behalf of the City of New York (rather than the State of New York) in prosecuting the plaintiff in a State court for violation of a State criminal statute, there would seem to be no basis for a claim of violation of constitutional rights warranting review by this Court.

In the Court of Appeals the plaintiff's brief (p. 6) stated that the plaintiff's claim was "based upon 28 U. S. C. 1343 (3), which is derived from 42 U. S. C., Sec. 1983" and sought to distinguish *Monroe* v. *Pape*, *supra*.

Counsel representing the petitioner (not the counsel who appeared on his behalf in the Court of Appeals) now contends that his client's cause of action is not based on 42 U. S. C. 1983 but is grounded on 28 U. S. C. 1343 (3), which, it is asserted (Petition, p. 9), confers jurisdiction upon the federal courts to entertain suits for damages separate and apart from suits to recover under the Civil Rights Act.

The petitioner's contention is without merit. It is premised (see Petition, p. 9) on the untenable assumption that not until the year 1875 were federal courts given "original jurisdiction of civil suits arising directly under the Federal Constitution." Reference is made in the petition (*ibid.*) to the opinions of Justices Roberts and Stone in *Hague* v. *C. I. O.*, 307 U. S. 496 (1939), in support of this statement.

A reading of the opinions in the cited cases shows that they do not support the petitioner's position. Mr. Justice Roberts dealt (at p. 508) with 24 (14) of the Judicial Code, 28 U. S. C. 41 (14), which, as quoted by the Court (*ibid.*), is practically identical with present 28 U. S. C. 1343 (3). In a footnote (p. 508, fn. 10), the Court states that "The section is derived from R. S. 563, 12, which, in turn, originated in 3 of the Civil Rights Act of April 9,

1866, 14 Stat. 27, as reënacted by § 18 of the Civil Rights Act of May 31, 1870, 16 Stat. 144, and referred to in § 1 of the Civil Rights Act of April 20, 1871, 17 Stat. 13."

It thus appears that 28 U. S. C. § 1343 (3) or, more properly, the statute from which it derives, was part and parcel of the initial Civil Rights Act of 1866 and that its purpose, then as now, was to define the jurisdiction of the federal courts with respect to suits under that Act. This view is bolstered by the observation of Mr. Justice Frankfurter, dissenting on points not here relevant, in *Monroe* v. *Pape*, 365 U. S. 167 (1961), that (p. 213, fn. 18), "The jurisdictional provisions may now be found in 28 U. S. C. § 1343."

Judge Bonsal in dismissing the instant complaint in the District Court (Appendix in Court of Appeals, filed herein, p. 19a; also 208 F. Supp. 681, 682), noted that "The plaintiff's action is based on 28 U.S.C. § 1343(3), which section provides the jurisdictional basis for claims under 42 U.S.C. § 1983 (R.S. 1979)." So, too, the writer of the note in 66 Harv. L. Rev. 1285 (1953), referred to by Judge Bonsal (Appendix in Court of Appeals, filed herein, p. 19a) says (at p. 1293) of § 1343(3) that it "has traditionally provided the sole jurisdictional basis for claims under [Title 8] Section 43 [see now Title 42, § § 1981-1983]."

Since, then, 28 U.S.C. § 1343(3) does no more than confer jurisdiction upon the federal courts to entertain suits arising out of alleged violation of the Civil Rights Act, it follows that the holding of this Court in *Monroe* v. *Pape*, *supra*, 365 U. S. 167 (1961), that a municipality is not a

"person" within the meaning of that Act is decisive here and precludes a recovery of damages by the petitioner against the City.

The petitioner seeks (Petition, pp. 11-12) to derive some advantage from the statement in the opinion of the Court of Appeals (Appendix to Petition, p. 25) that "the sole basis of plaintiff's claim is based, not on the Civil Rights Act, but directly upon Section 1 of the Fourteenth Amendment to the United States Constitution." We affirm on the ground that plaintiff has not stated a claim upon which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure. *See Bell* v. *Hood*, [supra], 327 U. S. 678 (1946)]; *Shaffer* v. *Jordan*, 9 Cir., 1954, 213 F. 2d 393, 396-97."

The Court of Appeals put its holding in this form because the District Court had "dismissed for lack of jurisdiction" (Appendix in Court of Appeals, filed herein, p. 20a), whereas the Court of Appeals was of the view that, while the Court had jurisdiction of the subject matter, the complaint should nevertheless be dismissed for failure to state a cause of action. This is apparent from the reference in its opinion (Petition, p. 25) to *Shaffer* v. *Jordan*, 213 F. 2d 393 (9th Cir., 1954) where (pp. 396-397) the Court concluded "that the complaint failed to state a claim upon which relief could be granted; that the District Court nevertheless had jurisdiction over the subject matter of the action [citing in a footnote *Bell* v. *Hood*, *supra*]; and that, therefore, instead of being dismissed for lack of jurisdiction, the action should have been dismissed for failure of the complaint to state a claim upon which relief could be granted."

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CONCLUSION

The petition for certiorari should be denied.

March 27, 1963

Respectfully submitted.

LEO A. LARKIN
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